

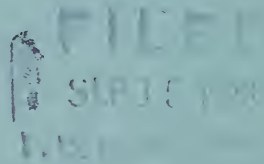
United States
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Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM J. CAMPBELL and J. L. TOBIN,
Plaintiffs in Error,
vs.
WILLIAM GRANT,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States District Court for the
Territory of Alaska, Fourth Division.

R. F. ROTH,
Attorney for Plaintiffs in Error.
MORTON E. STEVENS,
Attorney for Defendant in Error.



No. 4001.

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**Points and Authorities of Appellants Statement of
Facts.**

In the month of April, 1920, the appellee, William Grant, attempted to locate a placer mining claim in the Kantishna Precinct, Fourth Division, Alaska, which he named "Hill Bench Claim," containing 20 acres, more or less, by setting two stakes on the northerly side and adopting two stakes of the Horseshoe Placer Claim on the southerly side, and by recording a notice of location in the following words and figures:

"Notice of Location of Placer Claim.

Notice is hereby given that I, Wm. Grant, have discovered placer gold within the limits of this claim

and have this day posted this notice of location at the point of discovery. I claim 1320 feet in length by 660 feet in width as marked on the ground for placer mining purposes. This claim shall be known as Placer Mining Claim, Hill Bench, opposite and on the east side of Horseshoe Placer Mining Claim on the right limit of Moose Creek, Kantishna Precinct, Territory of Alaska. Discovery made Sept. 10, 1919. Location notice Posted April 1920.

WM. GRANT,
Locator.

Witness:

J. HAMILTON."

which said notice was immediately recorded in the recorder's office of the said Kantishna Precinct. (Trans., p. 77.)

That thereafter, prior to the 7th day of August, 1920, one J. B. Quigley entered upon the superficial area of said Hill Bench Placer Mining Claim, as shown by his notice of location (Trans., p. 196), sunk four holes to bedrock (Trans., pp. 201-2), discovered a lode of mineral bearing rock on the ledge right in line and drove a tunnel on the ledge a little more than 240 feet (Trans., p. 202).

Three shafts were sunk opening the ledge by Quigley before he sunk the shaft that he designated as his discovery shaft and before he staked the Red Top or made a notice of location (Trans., pp. 478, 479, 480), and as shown by the two plats on file, marked Plaintiff's Exhibit "A" and Defendants' Exhibit "2," from which it appears that J. B. Quigley discovered this vein of quartz inside of the exterior boundaries of the Hill Bench Placer Claim

in two separate places before he made any attempt whatever to locate the Red Top Lode Claim. All the testimony on the point is to that effect, and there is no contention to the contrary that William Grant knew of Quigley's prospecting for quartz and it is admitted expressly that Quigley's location of his Red Top Lode Claim was at all times a valid location, and Quigley had his tunnel on the lead and at least three shafts on the lead making a straight line, as shown by all of the testimony and especially by the two plats on file.

Campbell and Tobin taking a line of different points of discovery made by Quigley started to sink a hole twenty-five feet below the end line of Quigley's Red Top Lode Claim, and sunk a distance of forty-eight feet into a vein of mineral bearing rock in place (Trans., pp. 421-2-3), and after making such discovery staked a lode claim calling it Silver King Lode Mining Claim (Trans., pp. 205-6). After which plaintiff, William Grant, staked a claim over the defendants, Campbell and Tobin, taking Campbell and Tobin's discovery at the bottom of their shaft as the discovery for his lode claim, calling his lode claim the Hillside Quartz Claim, claiming that he made his discovery July 25th, 1921, and recording his notice of location thereof on the 26th day of July, 1921 (Trans., p. 124).

Grant also claimed that he based his discovery upon the fact that the vein that he saw in the defendants' shaft was a known lead, and his testimony is as follows on that point (Trans., p. 145).

“Q. What did you base that discovery on?

A. I based it on what I found on the dump and also on a known lead.

Q. How did you know that it was a known lead?

A. I knew it was a known lead by all reports.

Q. By all reports?

A. Yes.

Q. It was commonly known?

A. Yes, sir.

Q. It was commonly known to be a quartz lode and also it *shoed* on the Dump? You knew it for some time? A. Yes, for some time.”

It is conceded that defendants entered upon the ground peaceably and commenced the work of sinking their discovery shaft without any interference by the owner of the alleged placer claim, and that they continued their work of sinking the shaft to the depth of forty feet where they struck the vein and continued into the vein a depth of eight feet before there was any interference by any one, or any intimation that any one would object, but on the other hand the plaintiff claims that he was away from the claim a distance of thirty miles at Roosevelt, and did not know that defendants were working on his placer claim.

Plaintiff brought an action in ejection, claiming ownership by virtue of a placer mining claim, and also by virtue of a subsequent lode claim. Defendants denied plaintiff's ownership.

That after defendants had made their discovery in their shaft, as aforesaid, J. L. Tobin, one of the defendants, testified that on the 16th day of June,

1921, he saw William Grant, the plaintiff, at Roosevelt, and that during the conversation Grant said to him

“I heard you struck it pretty good,”—or rich, I wouldn’t be sure about the exact word—I says, “We have a good prospect” and he says, “I understand you sunk in one of my holes.”

Q. What did you say?

A. I said, “No, I did not.”

Q. Was there anything else said?

A. Nothing concerning this ground—we talked about the neighbors and others—Mr. Miller stood by.” (Trans., pp. 423–4)

Grant, the plaintiff, saw the defendants, Campbell and Tobin, about the 23d of June on the Silver King Lode Claim, but did not serve any notice upon defendants or make any complaint about their being in possession of any part of his placer claim (Trans., p. 425).

The first time that William Grant, the plaintiff, said anything to the defendants that would show that he objected to their being on the Hillside Bench Placer Mining Claim was on the 3d day of July, 1921 (Trans., pp. 426–7), so that the first objection made by Grant to these defendants was after they had sunk their hole to a depth of at least forty feet, had timbered it and had made a valuable discovery.

On these facts defendants, plaintiffs in error, Campbell and Tobin, contend that the lode which they discovered, and which they named the Silver King Lode was a well-known lode within the exterior boundaries of the placer claim claimed by plaintiff, as the same had been discovered and opened

by Quigley within the exterior boundaries of said Hillside Bench Placer Claim, and that Quigley's discovery was known by the plaintiff, Grant, and that Grant was aware of Quigley's prospecting there before Quigley staked the Red Top Lode Claim, and that Quigley, by his opening up this lode within the boundaries of the Hillside Bench Placer Claim, made it a known lode within that placer, and that the subsequent staking by Quigley of his Red Top Lode Claim could not change the lode within the boundaries of the placer claim from a known lode to an unknown lode. Having once been a well known lode within the boundaries of the placer claim it necessarily remained a well known lode therein.

Plaintiffs in error also contend that their peaceable entry on to the ground in question, and their working openly and in good faith by the sinking and timbering of a shaft, and discovering a vein of valuable ore in place, and their subsequently staking and locating and recording their claim according to law, made their location valid even though the placer claim had been validly located.

Plaintiffs in error contend that the alleged Hillside Bench Placer Claim was not properly located, and that a proper certificate of location was not recorded. The Session Laws of Alaska for 1915 covers the law completely with reference to the location of a placer mining claim in Alaska, and is contained in chapter 10 commencing at page 11. Sec. 1 of said Act provides

“He shall distinctly mark the location on the ground so that its boundaries can be readily

traced, by placing at each corner or angle thereof substantial stakes, or posts, not less than three feet high above the ground and three inches in diameter, hewed on four sides; or by placing at each corner or angle thereof mounds of earth or rock not less than three feet high and three feet in diameter and the stakes, post or monuments so used must be marked with the name or number of the claim and the designation, by number, of the corner or angle. The initial stake or monument, shall be one of the corner stakes, posts or monuments of the claim located.”

This provision was not complied with.

Commencing on page 148 of the transcript William Grant, the plaintiff below, testified as follows:

“Q. When you came to staking your placer claim, did you put a stake of your own at your initial corner?

A. No, sir.

Q. What was it you wrote on the initial corner post?

A. What I recorded, with the exception of the date.

Q. I am talking about the placer claim.

A. I am talking about the placer, too.

Q. You put on that corner post just what was on the notice of location?

A. With the exception of the date.

Q. And you copied—in order to make that notice of location, you copied off of your original notice of location stake?

A. Yes, sir.

Q. You put everything there on the stake in that notice?

A. I think I did.

Q. You copied it and that was your purpose?

A. Yes, sir."

This notice of location is Plaintiff's Exhibit "B," and will be found on page 77 of the transcript, and is hereinbefore set forth in full.

From this it is apparent that the second subdivision of section one of the Alaska Act above quoted was not complied with in that at least the initial stake was not numbered, and it is quite apparent from the reading of that notice that none of the stakes were numbered, and this being a plain provision of the Alaska Legislature, and a reasonable one, and being absolutely mandatory, and not having been complied with the claim never was properly located, and for that reason was at all times public domain open for location.

Also the certificate of location as recorded, being the same notice hereinbefore set forth, does not comply with the plain terms of section 2 of said Act of the Alaska Legislature. Subdivision (e) of said section 2 provides

"It shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments."

Said section further provides

"A failure to record a certificate of location of claim as herein provided shall operate as and

be deemed abandonment thereof, and the ground so located shall be open to re-location"; Sec. 9 on page 15 of said Act provides

"That any placer mining claim located or attempted to be located in violation of any of the provisions of this Act, shall be null and void and revert to the public domain and may be located by any qualified locator as if no such prior attempt had been made."

The law has been so very well settled upon the proposition of the validity of an Act of the Legislature with reference to notices of location and the certificates of such location to be recorded that it would seem superfluous to quote extensively from the authorities. We will therefore only name some of the authorities without comment.

Lockhart v. Johnson, 181 U. S., p. 516, 45 L. Ed. p. 979;

The question of the validity of the state statute was one of the main questions decided in this case, but there is no reference to it in its syllabus and the decision on this point commences on page 526 of the U. S. and on page 984 of the law edition;

Ehrhardt v. Board, 113 U. S., p. 527, 28 L. Ed., p. 1113; Butte City Water Co. v. Baker, 196 U. S., p. 119, 49 L. Ed. 409;

O'Donnell v. Ferrum Min. Co., 197 U. S. 343, 49 L. Ed. 784. This case is exactly in point upholding Butte City Water Co. v. Baker, 49 L. Ed. 409, but there is nothing in the syllabus bearing on the point.

Purdum v. Laddin, 59 Pac., p. 153; Hahn v. James, 73 Pac., p. 965; Dolan v. Passmore, 85

Pac., p. 1034; Hellena Gold & Iron Co. v. Baggaley, 87 Pac., p. 455; Deeney v. Mineral Co., 67 Pac., p. 724.

Discovery of a valuable lode had been made inside of the exterior boundaries of the Hillside Bench Placer Claim by J. B. Quigley, and after sinking several holes on to the lode he claimed the last hole that he sunk as his discovery, as will be seen plats, Plaintiff's Exhibit "A" and Defendants' Exhibit 2, and then located a lode claim, the boundaries of which extended into this placer claim, thus leaving a period of time after the discovery of the lode inside of the placer before such discovery was segregated from the placer claim by the location of the quartz claim, and, of course, we contend and maintain that in any event the discovery of this vein within the exterior boundaries of the placer claim by Quigley, and the location of his Red Top Claim, which is recognized to be valid by the defendant in error, made this lode a known lode within the exterior boundaries of the placer claim and rendered it the subject of location by any one who saw fit to locate it, more especially if the locator entered peaceably, openly and notoriously, and went to work sinking a shaft and continued for a period of about thirty days sinking and timbering, and as a result of his enterprise and energy discovered a lode of valuable mineral; that the placer claimant, who remained away from the ground and thus permits some one else to go to the expense and perform the labor required to develop a valuable lode claim will certainly not be permitted to take the benefit

of such labor and expense, and would not be permitted to say, under the circumstances, that he did not consent to such work being done.

But this was manifestly a known lode as it had been opened in at least four places in a straight line down to and into this placer claim, and the placer claimant himself, William Grant, recognized it as a known lode (Trans., p. 145), and this was on the 3d day of November, 1920, the year before the entry of Campbell and Tobin (Trans., p. 210). The placer claimant himself (Trans., p. 145) testified that he based his discovery of his lode, which was the discovery of the plaintiffs in error, on what he found in their dump, and also on the fact that it was a known lode that was commonly known to be a quartz lode, and he testified (Trans., p. 92).

“Q. And what did you say in regard to the lining up from Quigley’s discovery?

A. I told O. M. Grant when he was doing the assessment for placer, he might as well line up with Quigley and he might strike the lead there.”

Testimony of O. M. Grant.

O. M. GRANT, the man who did the assessment work for William Grant, concerning the place where he started to do the assessment work on the placer claim, testified (Trans., p. 215.)

“Q. What did you and Billy Grant do, if anything, with regard to finding a place to do this assessment?

A. Billy looked around and I asked him where to go to work, and he examined and

looked around and said, "Anywhere here—about 25 ft. from the line—make a hole." He went back up again and I think stepped the ground and I sank right here. (Indicating.)

Q. Did he use anything to measure with?

A. No, I don't think so.

Q. You used a shovel to measure with afterwards, didn't you?

A. Yes, 25 ft. I measured down from the center end post.

Q. You measured from the center end post of Quigley's straight down hill?

A. No, I went 25 ft. straight down and about 7 ft. or 6 ft. up stream from the strike of the post.

Q. By the 'strike of the post' you mean straight down? A. Yes.

Q. You went about 6 ft.? A. 6 ft. or 7 ft.

Q. Towards the up stream from Moose?

A. Yes.

Q. Why did you do that?

A. He lined up the ledge.

Q. Who? A. Billy Grant and I.

Q. Did you figure the ledge dipped towards the up stream?

A. He looked up at Quigley's holes—up where they were sunk—and he said about here would be in line with the ledge if it runs through here, and he said to sink on that.

Q. State any and all things you and Billy spoke of with reference to where you wanted to do the work.

A. After he had measured down and agreed where to sink the first hole, he says, "Sink about here, and if you find any float or indications of quartz, tell me, and try to get to bed rock and the lead of Quigley's. You may get some placer too." He said, "A little below is where I made my discovery. Sink around and you may get something if you get to bedrock." That was the substance of our talk.

Q. That was the substance of about all of your talk? A. Yes, sir.

Q. Did you have any arrangements with Billy Grant as to what might happen in the event you should strike a quartz lead?

A. None whatever. He just told me to let him know and I said yes I would.

Q. You were not sinking there to find a vein that you hoped to have any interest in?

A. No, sir."

There can be no question as to the right of anyone to enter peaceably upon a valid placer claim and locate a known lode (Vol. 2 Lindley on Mines, 3d Ed., Secs. 413-4); Morrison's Mining Rights, 15th Ed., p. 280 et seq.

Upon this question as to whether the lode in question was a known lode plaintiffs in error called one John A. Davis, a mining engineer, by whom plaintiffs in error expected to prove that in September, 1921, he investigated the lode or vein which runs through the Red Top Lode Claim of J. B. Quigley, and that he traced the same ledge across Moose Creek for a distance of about half a mile from the

Quigley tunnel in a southwesterly direction from the same, and that the strike as shown crossed the discovery shaft of these defendants, and that the ore taken from the discovery shaft of the defendants is the same in character and appearance as the ore taken from the lode on the Red Top Claim, and that across Moose Creek in a southwesterly direction from the tunnel of J. B. Quigley on the Red Top Lode, in a straight line, a lode was found by John Hamilton and lessees similar, and containing ore similar, to that on the Red Top Lode Claim (Trans., p. 476), but the said witness Davis asked permission to address the Court, and to be excused from testifying on the ground that employees of the Bureau of Mines are instructed, by the Secretary of the Interior of the Federal Government, to ask the right of exemption from testimony, as a protection of the Government's interests, and the Court (Trans., p. 475) in response stated:

“I feel frank to say that it would be causing undue embarrassment to the office of the Bureau of Mines to require any of them to testify as to any knowledge gained by them with reference to any question in controversy in this case. It would tend very greatly to lessen their usefulness as officers in that Bureau, and for that reason the testimony of this witness will be excluded, if it is for the purpose stated by counsel.”

Then counsel for plaintiffs in error made their offer as above stated, and the Court ruled that Mr. Davis need not testify.

We know of no authority that would exempt an officer of the Bureau of Mines from testifying, especially when it was stated, as in this case, that he would be asked nothing about any matter confidentially obtained, or that could not be given without violating a confidence of any kind or character (Trans., p. 474).

J. B. QUIGLEY testified to the same things that plaintiffs in error expected to prove by John A. Davis (Trans., pp. 481-2-3-4).

Plaintiffs in error having entered upon the ground in question peaceably, quietly, openly and notoriously, and without interference, their discovery of a lode, as a result of such labor, gave them the right to locate a valid lode claim, even if the lode had been an unknown lode prior thereto.

The only authority upon which the Court below gave the instructions upon this point adverse to the contention of plaintiffs in error is the case of Clipper Co. vs. Eli Co., 194 U. S. 220, 48 L. Ed. 944, which is the case that has thrown confusion into the subject of the location of lode claims within the superficial area of placer locations.

We contend that the decision of this case, to the effect that the location of a lode claim within the boundaries of a prior valid placer location against the will of the placer locator is void, was inadvertant, not necessary and not embraced within the issues of that case, for this reason: At the time of the attempted location of the lode claims in question patent for the placer had already been applied for and under all of the authorities it is conceded that

the question as to whether or not there is a known or unknown lode is determined at the time of application for patent, and also that title to all lodes that are not known to exist within the exterior boundaries of the placer claim pass at the time of application for patent, consequently any subsequent discovery of a lode would be a discovery of a lode, title to which has already passed to the applicant for patent, subject, of course, to this title being defeated subsequently. The facts in the Clipper case are that the Searl Placer Mining Claim was located on the 12th day of December, 1877, and on the 5th day of July, 1878, the locators applied for a patent. This application for patent was held up but never finally disposed of, and subsequently the Searl Placer was held to be a valid placer, consequently the rights of the placer claimants to unknown lodes would relate back to the time when they applied for patent.

This is clear because their claim was subsequently determined to be a valid placer claim; hence they would be, under the law, entitled to procure a patent if the requisite work had been done, therefore, their claim being a valid claim, according to the decision of the Colorado Court, it is clear that they would be entitled to the benefit of their prior application for a patent, and that the status of a lode, that is to say, if it were a known or unknown lode, would be determined as of the date of their application for the patent.

This will be made very clear by referring to the original case decided by the Supreme Court of

Colorado and reported in the 68th Pac., page 286. There was a petition for rehearing and the appellants in that petition contending very strenuously against the position apparently taken by the Court as to the rights of a person to locate a lode upon a placer prior to application for patent, the Court, on page 290 says:

“The defendant alleged, and the plaintiffs denied, that the lode claims were known to exist before application for a placer patent. The findings were that the locators of the lode claim had not the right to go upon the territory included within the placer location for the purpose of prospecting and locating lodes. Possibly we have not hitherto made sufficiently prominent the fact that a patent for the placer was applied for long before an attempt was made to locate the lode claims,—the original application in the year 1878 or 1879, the exact date being immaterial. An amended application was made in the year 1882, which was rejected by the secretary of interior in November, 1890, and it was not until after this last date that the locators of the lode claims made an entry upon the placer location.” * * *

“At all events, the application for a placer patent was made 11 or 12 years before the alleged right to the lode claims was initiated. Before it can be said that a lode is known to exist, there must be actual knowledge, as distinguished from supposition or surmise. *Sullivan v. Mining Co.*, 143 U. S. 431, 12 Sup. Ct.

555, 36 L. Ed. 214. And, in order to uphold the judgment, we shall assume, as very properly we may, that the trial court, as a matter of fact, found that the lodes were not known to exist until after the application for a patent was made. Indeed, we do not see what other finding could possibly be made when it is considered that the locators of the lode claims did not enter upon the placer claim to prospect until years after its owners had applied for a patent. And for aught that appears to the contrary—which is the contention of the defendants in error—the lodes may have been discovered and their existence thus first become known only by sinking a shaft to a depth of several hundred feet beneath the surface, and that the entry by the lode locators was forcible and against the will of the placer claimant.”

The Supreme Court of the United States in its decision affirming this case, *Clipper M. Co. vs. Eli M. Co.*, 194 U. S., p. 220, 4 L. Ed. 944, in the very opening paragraph states:

“The location of the placer mining claim and both the original and amended applications for patent thereof were long prior to the locations of the lode claims, and the contention of the plaintiffs is that they, by virtue of their location, became entitled to the exclusive possession of the surface ground; that the entry of the lode discoverers was tortious and could not create an adverse right, even though, by means of their entry and explorations they discovered

the lode claims. The defendant, on the other hand, contends that the original location of the placer claim was wrongful, for the reason that the ground included within it was not placer mining ground."

From this statement it is quite evident that the only question at issue in that case that can be in point here was as to whether or not the placer claim was a valid claim, for if it were a valid claim that would end the controversy absolutely because their application for a patent would be valid if the location were a valid location, and no right whatever could be instituted by the lode locators after the application for patent had been made.

The decisions by the Colorado Supreme Court and by the Supreme Court of the United States are manifestly right, but both of the Courts got off on to a dissertation as to the rights of a placer claimant before patent applied for, which was not at all in point, and was not necessary for the decision, and for that reason should have no binding effect upon the rights that might arise between a prior placer claimant and a subsequent lode claimant on the same area before patent applied for by a placer claimant.

Morrison in his work on mining rights 15th edition at page 286 says, speaking of the Clipper case:

"This practically gives all blind lodes to the placer owner and thereby defeats the intent of the Act of Congress. But it is within the limits of judicial construction and is therefore a binding authority to the extent of the decision."

Thus it will be seen that to as good an authority on mining law as Mr. Morrison this decision in the Clipper case, so far as it relates to the location of a lode on a placer claim before patent applied for by the placer claimant, defeats the intent of the Act of Congress, and there can be no doubt whatever but that it does defeat the Act of Congress if the decision goes to that extent, but it is equally clear that Mr. Morrison did not analyse the Clipper case as closely as the case warrants because it was not necessary to decide in the Clipper case that a valid entry could not be made upon a valid placer claim before patent applied for and a valid lode claim be thereby initiated without the consent of the placer claimant, because, as before stated, patent had been applied for by the placer claimant in the Clipper case before entry made by the lode claimant.

Mr. Lindley in his work on mines 3d Ed., Vol. 2, Sec. 413, page 961 says, concerning lodes within placers:

“That when so found they may be held by the same or different persons is well settled by both judicial and departmental decisions.”

Citing Reynolds vs. Iron S. M. Co., 116 U. S. 687; Aurora Lode vs. Bulger Hill Placer, 23 L. D. 95.

In the same section on the same page the author says:

“There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former, there is a grant of the exclusive right of enjoyment of the surface and everything

within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface. No subsequent locator, either lode or placer, can invade such surface, though he may openly and peaceably enter for the purpose of laying his lines in such a manner as to properly define his extralateral right. On the other hand, lodes found with the placer surface, or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant. Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is to sever them from the body of the public lands, and to deal with them and the land immediately enclosing them as separate and distinct entities."

Continuing in the same section on page 962 he says:

"The placer claimant may, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation, unless the existence of the lode remains unknown until the application for a placer patent is filed."

Citing *Aurora Lode v. Bulger Hill Placer*, 23 L. D. 95.

Continuing the author says in the same paragraph:

“It is no objection to the validity of a placer location that it embraces veins or lodes as well as placer deposits, but the right to appropriate the lode must flow from the discovery of the lode. Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to claim it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; provided, always, that such appropriation is made and perfected peaceably and in good faith.”

Citing *McCarthy v. Speed*, 11 S. D. 362, 77 N. W. 590, 592; *Mt. Rosa M. M. & L. Co. v. Palmer*, 26 Colo. 56, 56 P. 176, and also the *Clipper* case above cited.

Continuing in the same section the author on page 965 says,

“If a placer claimant has abandoned his claim, or waived the trespass, or by his conduct is estopped from complaining of it, the subsequent lode location will be considered valid.”

Citing the *Clipper* case above quoted.

On page 966 of the same volume the author, drawing his conclusions from all of the statements made in this section (413), says:

“(1) A perfected placer location does not confer the right to the possession of veins, or lodes, which may be found to exist within the placer limits at any time prior to filing an application for a placer patent;

(2) Such lodes may be appropriated (a) by the placer claimant, or (b) by others, provided the appropriation is effected by peaceable methods and in good faith;

(3) Where a lode is known to exist within the limits of a placer location at any time prior to the placer application for patent, and is not claimed in the application as a lode, the title to such lode does not pass by the patent, but it may be located by anyone having the requisite qualifications, provided the location is made peaceably and in good faith.”

From the foregoing it will be seen that no case has been decided by any court against the subsequent lode claimant and against the prior lode claimant where the entry of the lode claimant was made peaceably and in good faith, and discovery of an unknown lode made prior to the application for patent by the placer claimant, and in the case at bar application has never been made for patent by the placer claimant.

The foregoing points cover completely assignments of error I, II, III, IV, V, VI, and VII.

The error complained of in the VIII assignment of error is well taken because the evidence, as heretofore set forth, that the claimant of the placer claim knew, for a considerable length of time, that

the defendants were working on the placer claim, and also that they had made a discovery, and he permitted them to continue to work without notifying them that he claimed the ground, and without notifying them to leave the ground.

The error complained of in the IX assignment of error is manifest because the Court instructed the jury in effect that the location of a placer mining claim was equivalent to a grant from the Government of an unknown lode within the boundaries of such placer claim, when, as a matter of fact, all lodes are excepted, and unknown lodes only pass when application for placer patent is made.

The X assignment of error is well taken because it instructs the jury that

“A substantial compliance with the laws governing the location of quartz and placer mining claims is all that the law requires.”

This is not the law except in certain particulars.

Where the law specifically provides that certain things must be done, such as marking the boundaries in a particular way when the statute provides for such marking and recording a particular certificate, those special requirements must be complied with.

Under instruction No. 20, assigned as error in this assignment, the jury might have well felt that even though the placer claimant failed to number the stakes, as required by law, and that he failed in the recorded certificate to describe the stakes with reference to their numbers, as is also the fact in this case, that it was still a substantial compliance

with the law, which is strictly erroneous, and contrary to all of the decisions heretofore cited on that point.

The error assigned in the XI assignment of errors is well taken because it states that

“When the controversy is between two mineral claimants, as in this case, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry.”

This was entirely misleading to the jury because while the plaintiff and defendants were mineral claimants yet they were claimants for different kinds of mineral claims, and the person claiming a placer claim, which he is not working as a placer claim but only holding by doing the annual work, and a person coming along and making a discovery of a valid lode claim, the placer claimant is in exactly the same category that he would be in if his controversy were against an agricultural claimant.

The rule stated in instruction No. 22, complained of in this assignment, would be correct law if the two mineral claimants were either both placer claimants or both lode claimants. The instruction, therefore, was clearly misleading, and gave the jury leeway to which they were not entitled.

The XII assignment of error is manifestly well taken because the Court in instruction No. 23 instructed the jury:

“Where there is a valid location of a mining claim, either quartz or placer, the area thereof

becomes segregated from the public domain and the property of the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location.”

This language is true as to a quartz location, but it is not true as to a placer location because a placer location is for the purpose of obtaining the right to mine for placer gold, and a valid quartz location may be made within the superficial area of the placer claim, and it is not true, as shown by the authorities heretofore cited, that the placer claimant, by virtue of his placer location, becomes the owner of an unknown lode within his claim prior to the date of his application for patent, as title to that lode absolutely remains in the Government whether it be known or unknown until patent is applied for and the application accepted by the Government on the placer location, and it follows, therefore, that the placer locator has absolutely no right to the possession of a lode within his claim prior to the date of his application for patent, but he may exclude all persons if he desires from entering upon the surface and prospecting, but if one does enter and prospect, either with or without his consent, and uncovers an unknown lode the same then becomes a known lode whether the discoverer of it is entitled to enjoy it or not, but it is clear that the owner of the placer claim cannot acquire title to a lode that is discovered within his placer claim before patent applied for, whether the same was rightly or wrongly discovered; therefore, the instruction is clearly wrong, because the placer claim-

ant is not the owner and has not the exclusive right of possession of any lode within his claim before he applies for patent, and this certainly misled the jury.

The XIII assignment of error is clearly a good assignment because the Court in instruction No. 34 says:

“The object of any notice or markings on the ground is to identify the claim, and to guide the subsequent locator, and to inform him as to the extent of the claim of the prior locator and whatever notice does this fairly and reasonably should be held to be a good notice.”

This in effect instructs the jury that they may disregard the law that refers to numbering the stakes of a claim, or as to the size of the stakes, or as to the recorded certificate, providing the jury may fairly and reasonably determine that the subsequent locator was informed as to the extent of the claim of the prior locator. This is contrary to all of the decisions which hold that a provision of a statute which requires a particular thing to be done must be done in order for the claim to be valid, regardless as to whether or not the subsequent locator may have accurate information as to the extent of the prior location.

The XIV assignment of error is well taken because instruction No. 25A complained of in said assignment tells the jury that a locator of a placer mining claim may disregard a plain provision of the statute, to wit:

“He shall distinctly mark the location on the ground so that its boundaries can be readily traced, by placing at each corner or angle thereof substantial stakes, or posts, not less than three feet high above the ground and three inches in diameter, hewed on four sides”; (Session Laws of Alaska 1915, p. 11).

This is an express provision of the statute and must be complied with, and there was no attempt on the part of the placer claimant to place stakes at two of the corners. He claims that he adopted two stakes belonging to an adjoining claim owner, which he was not authorized to do under the statute. This instruction No. 25A, is, therefore, clearly in conflict with the direct provisions of the statute herein cited.

The XV assignment of error concerns instruction No. 29, and this assignment is especially well founded because the Court instructed the jury that, in the case at bar, if the placer claim in question were a valid placer claim and the lode discovered by the lode claimant had been theretofore an unknown lode then the lode claim in question was void, taking the matter away from the jury entirely as to whether or not the placer claimant, by his conduct, had consented to the prospecting of the plaintiffs in error, and instructing the jury in effect that a placer claimant, who has initiated a valid placer claim, may, by doing the annual work, segregate that superficial area so that a valid lode claim could not be initiated within the superficial area thereof. In other words a man might locate

a placer claim on a hill, where valuable lodes had been discovered, and by making a discovery of a few colors of placer gold initiate a valid placer claim, and he could go to Europe, making provisions only to have the annual work done, until the prospectors determine absolutely that a valuable quartz claim can be found by digging within the superficial area of his placer claim, then go upon his ground and avail himself of this prospecting of other for quartz, and through the holding of a valueless placer claim, and through it alone, acquire a valuable lode claim. Such was not the intention of Congress, and we contend that it has never been so decided by any Court where that point was necessary to be decided.

And for the same reasons the XVI and XVII assignments of error are also well taken as the 30th and 33d instructions of the Court cover the same ground practically as the 29th instruction.

The XVIII assignment of error especially discloses error, as instruction No. 35, which is the subject of this assignment, in the first paragraph of which the Court gives the jury to understand that if any person shall locate a lode claim and post a notice, or files of record a location certificate, giving the date of discovery, that such notice or certificate is an admission on the part of the locator that the placer so discovered was prior thereto unknown. In other words the Court plainly told the jury that when a notice or certificate states the date of a discovery that it is the discovery of an unknown lode. Therefore, if the lode had been

exposed to view to the locator of the lode and to the whole world, and he should post a notice or record a certificate on which he claims a certain date for his *discovery* such certificate or notice makes it an unknown lode, which, of course, is not the law and misled the jury.

This first paragraph is absolutely inconsistent with the second paragraph of the same instruction, which says exactly the opposite, and the whole instruction could do nothing but confuse the jury.

The XIX assignment of error is error assigned to the last sentence of instruction No. 36, which instructs the jury:

“On the other hand if said location was upon an unknown lode within plaintiff’s said placer claim, they should find for the plaintiff.”

This excludes the possibility of a valid lode location upon an unknown lode within a placer mining claim.

The XX assignment of error, which refers to instruction No. 36, is error based upon that portion of the instruction which gives such importance to, and indeed makes it the one important fact in issue, as to whether or not the lode claimed by defendants was known to exist or was not known to exist within the then boundaries of plaintiff’s placer claim at the time defendants entered, thus telling the jury in effect that although J. B. Quigley had made a discovery of a lode within the exterior boundaries of the placer claim, and had afterwards taken that location into a lode claim that he lo-

cated, thus cutting off a portion of the placer claim, that a subsequent prospector for the same lode would be bound by the boundaries of the placer claim as fixed, not by the original locator of the placer claim, but by J. B. Quigley, who cut a part of it off containing the lode.

We contend that there is no authority, law, logic, or common sense that will support a proposition of that kind, and an attempt to make that the law is certainly making of a placer claim a sort of a sacred area, so that if a man locates a placer claim on the side of a hill that is showing up good for quartz and validates his placer by finding a few colors of placer gold he can prosecute a man for trespass who should find it necessary to even walk across his claim in order to get to his work to dig for his quartz lode. This was never intended and we don't think the Court will sustain any such decision, because there is no law for it and it is wrong.

The XXI assignment of error refers to instruction No. 38 and is assigned as error because, first, it is a statement of the fact upon which the following instructions were based, and, second, that the location of the Quigley Red Top Lode Claim was not in controversy in this action, and the reference to it simply tended to confuse the minds of the jury as to the real issues to be decided. This instruction No. 38 merely refers to the location of Quigley, and the segregation of Quigley by his location of a portion of the placer claim.

Assignment of error XXII is well founded because, following up instruction No. 38 the Court in instruction No. 39 expressly told the jury that if the placer claimant consented to Quigley's location that that would cut off that superficial area contained in Quigley's quartz claim from the placer claim, and said instruction also instructed the jury concerning the casting off, by the placer locator of a portion of the superficial area of his claim when there was no evidence upon which to base such instruction and tended only to confuse the jury.

The XXIII assignment of error concerns instruction No. 40, which instruction plainly tells the jury that if Quigley's location of his Red Top Lode Claim, which was apparently within the boundaries of plaintiff's placer claim was located by Quigley with the consent of the placer claimant, or that the placer claimant either acquiesced in or did not object to said Quigley's location, then that portion of the Quigley's Red Top Lode Claim lying within the boundaries of plaintiff's placer claim could not thereafter be deemed to be any part of the placer claim. Here the instruction states the law to be that if Quigley's entry upon the placer claim in question and his discovery thereon *done without the objection* of the placer claimant that his location was valid, whereas the Court instructed the jury stating that the entry of the plaintiffs in error, which was done without objection also was absolutely void and a trespass unless done with the express consent of the placer

claimant. Also this instruction goes farther and says that even though Quigley by his discovery of a lode of valuable mineral-bearing quartz within the superficial area of this placer claim and thereby making it a well-known lode within the placer claim that by the location of said lode by Quigley after its discovery in said placer, that this act of Quigley's segregated this portion of the lode from the placer claim and changed the status of the lode within the placer claim from a known lode to an unknown lode. There has been no law or authority cited to support a contention of this kind and we will venture the remark that it can only serve to deprive the prospectors, who have expended their time and labor in digging and timbering a shaft 48 feet, of the benefit of their valuable discovery by a man who has sat back and waited for them to make this discovery with the hope that he could swoop down upon it and locate a lode claim based upon this discovery, which was attempted to be done in this case, and which has so far been successful.

The XXIV assignment of error is to instruction No. 42, and the assignment is well taken for the reasons stated in the last three paragraphs.

We have not endeavored to reiterate the authorities when dealing with the assignments of error in particular because at the beginning of this brief we have set forth the authorities which touched upon, and are decisive of the issues raised, and, of course, we have cited no authorities upon the point as to whether or not a prospector who enters upon

the superficial area of a placer claim and digs and makes a discovery of a vein or lode containing valuable minerals, without either the objection or consent of the placer claimant, and afterwards locates a quartz claim which extends into the placer claim having the full width of 600 feet that such location of such lode will segregate that area from the placer claim and change the status of the lode so discovered inside of the placer claim from a known lode to an unknown lode. There are no authorities on this point so far as I have been able to find within our limited library in Fairbanks, and I do not believe that the question has ever been raised before, and I feel that such a contention is not based upon law or equity.

It is our contention that the lode in question considering the discovery of plaintiff in error was made on a known lode within the placer claim and that the discovery of this known lode was made by plaintiffs in error, peaceably, openly and notoriously, and in good faith, and that no objection of any kind had been made, until, by their efforts, they had uncovered, by their expense and labor, a lode containing valuable minerals, and that the attempt of the defendant in error to appropriate this discovery to himself by locating a lode claim over the lode claim of plaintiffs in error and claiming the discovery of plaintiffs in error as the discovery for his lode claim is ridiculous and preposterous and so inequitable that no Court would give validity to it unless compelled to do so by an in-

flexible law that would not permit them to do otherwise.

We therefore submit that the judgment should be reversed.

R. F. ROTH,
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Due service of a typewritten copy of the foregoing brief admitted this 18th day of August, 1923.

MORTON E. STEVENS,
Attorney for Defendant in Error.

